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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of MARIO and MARIA MALDONADO.	B207231 (Los Angeles County Super. Ct. No. PD036237)
MARIO MALDONADO, Appellant, v. MARIA MALDONADO, Respondent; ALEXANDRA K. MELLS, Claimant and Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan H. Friedenthal, Judge. Affirmed.

Law Offices of Richard a. Lowe & Associates and Richard A. Lowe for Appellant.

Law Offices of Alexandra K. Mells and Alexandra K. Mells for Claimant and Respondent.

No appearance for Respondent.

Appellant Mario Maldonado (Father) appeals from a postjudgment order awarding attorney fees to his former wife Maria Maldonado (Mother) and to Alexandra K. Mells, counsel for the parties' minor son. Father contends: 1) declarations submitted by Mother's attorney and Mells in support of their requests for fee awards contained inadmissible hearsay; and 2) the trial court abused its discretion by awarding fees pursuant to Family Code section 271,[1] because Father did not engage in any conduct that warranted sanctions and the amount awarded is an unreasonable financial burden. We conclude that Father has waived his evidentiary objections by failing to obtain a ruling in the trial court. Father has provided an inadequate record on appeal to review the trial court's exercise of its discretion to award attorney fees under section 2030, based on the relative needs of the parties or section 271, based on Father's conduct.[2] No abuse of discretion has been shown. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Father and Mother were married on February 22, 1992. They have a daughter, who was born in January 1994, and a son, who was born in July 1995. Both parties were arrested for spousal abuse during the marriage, but no charges were filed. Father and Mother separated on February 22, 2004. Father filed a petition for dissolution of the marriage.

On April 18, 2005, the trial court granted sole legal and physical custody to Mother pending trial of the parties' custody issues and ordered Father to enroll in an approved 52-week domestic violence program. In May 2005, the son began seeing therapist Alicia Stone. Marsha Wiley prepared a court-ordered custody evaluation. The court entered a judgment of dissolution on April 7, 2006, that did not address custody and

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[1] All further statutory references are to the Family Code, unless otherwise stated.

[2] Father's motions to augment the record on appeal filed October 28, 2008, and February 29, 2009, are granted.

visitation. Father completed the 52-week domestic violence program and voluntarily enrolled in an additional 26-week program.

In the summer of 2006, the trial court appointed Mells to act as counsel for the son. Mother and the children moved from Northridge to Moorpark, which required the son to attend a new school. In September 2006, the court granted Father unmonitored visitation rights.

In December 2006, Mother began dating Wilson Reyes. Reyes lived in the state of Washington and Mother discussed moving to Washington with her children. The son did not want to move again. In February 2006, Mother married Reyes in Nevada without telling her children. At the end of March 2006, Father experienced a major depressive episode. He was distraught about Mother's desire to move the children to Washington and fearful of losing his visitation rights. He began weekly therapy. The son, who had met Reyes a few times, visited Reyes in Washington during his school vacation in April. The son repeatedly attempted to intervene in any physical affection between Mother and Reyes.

Mother filed an order to show cause regarding custody and visitation, requesting permission to move the children to Washington in order to live with Reyes.[3] On April 17, 2007, Father filed a responsive declaration objecting to Mother's request to move the children to Washington. At a hearing on April 18, 2007, however, Father apparently agreed to allow the children to move to Washington.[4] Father and Mother executed a stipulation permitting Mother to move to Washington with the children and providing for specific visitation rights to Father.

Mother left the children at home in California in the care of their cousin and went to Washington on May 1, 2007. Near the end of May, the son told his teacher, Father,

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[3] Mother's application to move with the children to Washington is not part of the record on appeal. Mells's brief states that Father originally agreed to allow the move, but changed his mind, which required Mother to apply for a move-away order.

[4] A reporter's transcript of the April 18, 2006 hearing is not included in the record on appeal.

and Mells that he did not want to move to Washington. The son told Father that during his visit to Washington in April, Reyes said not to barge into the bedroom and hit him on the shoulder. On June 4, 2007, the son wrote a note to Stone and Mells. He stated that his mother had gone to Washington on May 1, 2007, and not returned. His cousin came to stay with him on certain days, but she went out at night with her boyfriend. He wrote that he wanted to live with his father. Mells's fax machine was not working, so the son called Mells and described the note. Father drove the son to deliver the note to Mells. On June 6, 2007, the son called the police and told them that Reyes had hit him. Later, he called the police and told them he had been left unsupervised. A social worker interviewed the son and concluded that he was manipulative and clearly untruthful. The authorities took no further action.

On June 7, 2007, Mells filed an ex parte application asking the trial court to order: 1) sole custody of the son to Mother and the move to Washington to go forward; 2) visits with Father suspended or significantly reduced and monitored; 3) telephone calls between Father and son suspended or recorded; 4) Father's summer visitation with the children cancelled; 5) Father to pay all attorneys' fees incurred in preparation of the ex parte motion, plus other attorneys' fees that the court deemed proper; 6) a child custody evaluation update to be performed by Wylie, or if Wylie were not available, an evaluator selected by the court; 7) personal weekly counseling for Father; and 8) counseling for the son in Washington, including discussion between the new counselor and Stone of the issues facing the son. Mells expressed concern that Father was creating issues, manipulating his son's emotions, and possibly instigating telephone calls to authorities. Father filed an opposition to the ex parte application.

A hearing was held on June 8, 2007. The trial court interviewed the son in chambers with Mells present. The court ordered a supplemental child custody evaluation and denied Mells's other requests. Father's attorney objected to the appointment of Wylie, but the court overruled his objection. After the court's ruling, Father repeatedly interrupted the proceedings to complain about Wylie's appointment and express his opinion that Wylie's evaluation had not been fair. The court told Father that he would be responsible to pay the full amount required for the custody update, subject to reallocation,

and asked Father to provide names of any witnesses that he believed Wylie needed to speak with in order to conduct an impartial evaluation. Mells requested $1,360 for her fees incurred for the motion. The court ordered the payment of Mells's fees to be shared equally by the parties, subject to reallocation. Mother had purchased a home in Washington and was about to start a new job. The court entered the move-away order that had been stipulated to by the parties.

The children moved to Washington on approximately June 20, 2007. Father did not have contact with them. In Washington, the son called the police and claimed that Reyes beat him, which Reyes denied. On June 21, 2007, the son climbed on the roof of the house and threatened to hurt himself. Mother asked the police to take him away because she could not handle him. The police took him to a hospital and recommended a 72-hour hold, because the son was out of control and there was not enough information to determine whether it was safe to release him back to his home. Mother told the hospital that she did not want him to come home. A child welfare agency in Washington became involved and the son called Father. A telephone conference was held among several parties. Father agreed to transfer his insurance coverage for his son from California to Washington in order that the son could receive treatment in Washington.

Father filed an ex parte application regarding a change of custody. Mells filed a response stating that although incidents had occurred in Washington, the son had been returned to his mother by the state and was to enter therapy immediately. She noted that Wylie required a deposit of $3,500 to prepare a custody update and Father had not yet transferred insurance coverage for his son from California to Washington.

At a hearing on July 3, 2007, Mother stated that she had agreed to return the son to Los Angeles. The trial court denied the request for a custody change to allow time for tensions to subside. The court ordered Father to pay for a plane ticket for his son and an escort to return to Los Angeles. The court stated that if Mother did not want to pursue the son's return to Washington at the custody hearing scheduled for August 3, 2007, she could make that choice. The court ordered the son's counseling sessions with Stone to continue immediately. Father withdrew his ex parte application. The court ordered him

to pay $3,500 to Wylie by 5:00 p.m. on July 5, 2007. The court also ordered him to reimburse Mother's attorney for the cost of the transcript.

On July 5, 2007, Father and son visited Wylie's office and paid her retainer. Father wanted Wylie's interview with the son to take place at his attorney's office, but she refused. Father asked to tape-record the interview and she refused. Instead of taking son to Stone for therapy sessions, Father took him for a few sessions with Dr. Charles Hanson.

At a hearing on August 3, 2007, Wylie informed the trial court that the son was extremely manipulative throughout his interview. The son told her that Reyes beat him in Washington on approximately 15 occasions prior to the incident on the roof and his mother had hit him in the parking lot after the hearing on June 8, 2007. The daughter said the son wanted all the things that Father had promised to give the son if he lived with him. Mother told Wylie that she had known Reyes only briefly and married him quickly because of their religious beliefs as Jehovah's Witnesses. She acknowledged that she had not prepared her children well for the marriage and had not handled the situation with her son on the roof appropriately. Wylie interviewed Father's mother. Father attempted to join the interview. After Wylie refused to allow Father to be present, he took a seat outside the room from which he could overhear the interview. The son interrupted the interview twice and Wylie told him that he could not stay. The son's behavior went unchecked during the interview.

Wylie recommended that the son return to Mother immediately and Mother should be required to contact child protective services. Father should not have any contact with the son for at least six months. Written contact could be gradually introduced at the discretion of the therapist based on the son's behavior. The son needed to receive a clear message that poor behavior is not acceptable or rewarded.

During a break in the proceedings, Mells observed Father and son crying. When Mells approached them, the son told her to leave, accused her of making the situation worse and used profanity. When the hearing resumed, the trial court questioned Father about the discussion with his son during the break. The court found that Father did not exercise any control over his son and allowed him to act as he pleased. The son's

conduct was rewarded with material things. The court interviewed the son in camera with Mells present. Wylie testified. The court concluded that the son was too well-informed and embroiled in the conflict. The court continued the hearing to August 14, 2007, and ordered the son to see a psychiatrist three times before the hearing. Father's counsel was unavailable on August 14, 2007, but the court instructed him to send an associate.

Wylie testified at the hearing on August 14, 2007. The trial court ordered: 1) sole legal and physical custody to Mother; 2) return of the son to Washington; 3) Father to enroll the son in PacifiCare's Washington network by 5:00 p.m. the following day; 4) Mother to find a therapist or psychiatrist in her geographic zone by the end of the week and start the son in therapy immediately; 5) Mother to inform Father of the son's new school; 6) written contact and monitored telephone calls between Father and son; and 7) submission of a status report in February concerning the son's well-being. The court concluded there was insufficient evidence to find any abuse by Mother, Reyes, or Mother's relatives but stated that if anyone struck the son in the future, the court would change the custody order. The court continued the hearing to February 1, 2008. Father filed a notice of appeal from the order.

Apparently in November 2007, the son was arrested for vandalizing Reyes's car. On November 26, 2007, the parties executed a stipulation that provided primary custody to Father and visitation rights to Mother. Father agreed to dismiss his appeal from the August 14, 2007 order. Father filed an ex parte application to obtain the trial court's signature on the stipulation. A hearing took place on December 17, 2007, at which Mells opposed entry of the stipulation.[5] Ultimately, the court continued the hearing.

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[5] The record contains a declaration that refers to a hearing on December 17, 2007. There is no reporter's transcript or minute order for December 17, 2007, in the record on appeal. Father's appellate brief claims certain proceedings occurred on December 19, 2007, and Father's notice to prepare a reporter's transcript designated a hearing on December 19, 2007. The reporter filed an affidavit stating that she had searched her notes and the calendar, but no proceedings were recorded on December 19, 2007. Similarly, Father's notice to prepare a clerk's transcript requested a copy of a minute order dated December 19, 2007, but the superior court clerk certified that no such document could be located in the superior court file.

On December 24, 2007, Mother's attorney filed a declaration regarding attorney fees. He declared, "All matters set forth in this Declaration are within my own personal knowledge, except for those matters stated as to information and belief, and as to those matters, I believe them to be true." He declared that Father's conduct had greatly increased his client's attorney fees and costs beyond the amount that would normally be incurred. Mother had incurred $11,966.35 in attorney fees, $354 in costs, and $150 per day court reporter fees for the hearings on August 3 and 14, 2007. He requested that the trial court order Father to pay $7,500 of Mother's attorney fees pursuant to section 2030 (based on need) and section 271 (as a sanction for conduct frustrating the policy favoring settlement and cooperation). Mother's attorney listed the following conduct by Father as justification for a fee award under section 271: withdrawing his oral permission for the children to move to Washington, requiring an ex parte hearing in April 2007, at which he simply agreed to the move; delivery of the son's letter to Mells, followed later in the day by the son's telephone calls to police; failure to cooperate in transferring the son's health insurance; delaying payment of Wylie's fees for the custody update and attempting to observe interviews with the son and his mother; lengthy and repetitive outbursts in court, which extended court hearings and resulted in the need for multiple appearances; disobeying the court's order to resume the son's therapy with Stone and unilaterally taking him to a new therapist; and filing a notice of appeal.

On December 27, 2007, Mells filed a declaration concerning attorney fees owed for her services on behalf of the son. Her declaration also stated, "All matters set forth in this Declaration are within my own personal knowledge, except for those matters stated as to information and belief, and as to those matters, I believe them to be true." She requested $12,150.57 for attorney fees and costs under section 2030, based upon the incomes of the parties and section 271, based on the conduct of the parties. She declared that Father had paid $1,660 and Mother had paid $1,435. In support of the request for fees under section 271, Mells stated that Father had refused to follow court orders, such as his failure to timely pay the retainer required for the custody update, failure to promptly transfer the son's insurance to Washington, and failure to take the son to see Stone upon his return to Los Angeles in July 2007.

On December 27, 2007, the trial court entered the parties' stipulation regarding custody and continued the hearing on attorney fees and costs to February 1, 2008. Father filed an opposition to the requests for attorney fees. He objected to the declarations of the attorneys on the ground that they were based on information and belief, and therefore, inadmissible hearsay. He argued that he had not attempted to prolong the litigation or frustrate the policy of the law. Rather, he had sought to obtain custody of his son to protect him from physical abuse by his stepfather. He argued that it was Mells's actions that unnecessarily prolonged the proceedings. He also argued that the requested amount would cause an unreasonable financial burden.[6]

Father filed an income and expense declaration on January 15, 2008, that shows gross earnings of $4,500 per month. His monthly expenses include: $1,300 for child support; $2,300 for his mortgage; $600 for groceries and $200 for dining out; $800 for utilities; $140 for child care; $300 for property taxes; $250 for clothing; and $250 for auto expenses. He pays $385 per month for loan and credit card balances of $52,500. The estimated equity in his home is $250,000.

A hearing was held on February 1, 2008. An attorney named David Kupfer appeared on behalf of Father's attorney Richard Lowe. Kupfer stated that Lowe was ill and requested a continuance. Kupfer stated that he was not prepared to oppose the motion. The trial court denied the request for a continuance. The court also denied a peremptory motion to disqualify that had been filed by Father pursuant to Code of Civil Procedure section 170.6, on the grounds that it was untimely and improperly served on the parties. Father repeatedly attempted to discuss his opposition to the appointment of Wylie and allegations that the court was biased.

The trial court found the amount of Mells's fees to be reasonable. "[B]ased on the conduct of the litigation," the court ordered Father to pay the remaining amount due of $10,790.57 to Mells and to reimburse Mother the amount that she had paid Mells. Father was required to make payments to Mells of $1,000 per month until the balance was paid.

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[6] Father's opposition to the fee requests refers to Mother's income and expense declaration, but Mother's declaration is not part of the record on appeal.

The court denied Father's request to reallocate the amount paid for Wylie's custody update. Father accused the court of prolonging the proceedings in order to make work for his friends. He also accused the court of punishing him because he had gotten his son back. The court stated that his relationship with Mells and Wylie was solely professional. Mother's counsel noted that Mother was seeking fees pursuant to sections 271 and 2030. The court awarded attorney fees to Mother and ordered Father to pay $7,500 to Mother's attorney at the rate of $500 per month. Father argued that he should not have to pay Mother's fees, because Mother had not wanted to keep custody of the son. He argued that the court caused her to incur the fees by insisting that she appear in court in person and continuing the hearing. The court asked Mells if she would be amenable to an order for payments less than $1,000 per month, because the total amount of required payments was "a lot of money." Mells refused. The court ordered the payments totaling $1,500 until the balances were paid in full. The court's order did not state the statutory basis for the fee awards.

DISCUSSION

Evidentiary Objections

Father contends the attorney declarations submitted in connection with the requests for fees contained inadmissible hearsay. However, Father has waived his objections.

When a party files evidentiary objections to declarations submitted by an opposing party in connection with a summary judgment motion and the trial court fails to rule on the objections, the objections are deemed waived on appeal and the evidence as having been admitted as part of the record for purposes of the appeal. (See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1, superseded by statute on another point as stated in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 783.)

In this case, the trial court did not rule on Father's objections to the attorneys' declarations. Father did not request a ruling on the objections during the hearing. By failing to obtain a ruling in the trial court, the objections have been waived. (Cf. *City of Long Beach v. Farmers & Merchants Bank*, *supra*, 81 Cal.App.4th at p. 783 [counsel requested a ruling twice in court and it would have been an idle act to have made a third request, so there was nothing more that counsel could be expected to do].)

Inadequacy of the Record

Mother and Mells requested attorney fee awards pursuant to section 2030[7] and section 271.[8] The trial court did not specify the statutory basis for the fee awards. On appeal, Father contends that awarding attorney fees to Mother and Mells as a sanction

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[7] Section 2030, subdivision (a)(1) authorizes the trial court to order a party to pay the other party's attorney fees "if necessary based on the income and needs assessments" to "ensure that each party has access to legal representation to preserve each party's rights." The decision to award fees and the amount awarded must be based on "the respective incomes and needs of the parties" and "any factors affecting the parties' respective abilities to pay." (§ 2030, subd. (a)(2).) In determining what is just and reasonable under the relative circumstances of the parties, "the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320 [regarding spousal support determinations]. . . . Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." (§ 2032, subd.(b).) Although the trial court enjoys broad "discretion in fashioning a needs-based fee award [citation], the record must reflect that the trial court actually exercised that discretion," and considered statutory factors in the process. (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 827.) However, when reviewing an order issued without a statement of decision, we presume the court made the findings to support its order under the doctrine of implied findings. (*In re Marriage of Ananeh Firempong* (1990) 219 Cal.App.3d 272, 280.)

[8] Section 271, subdivision (a) provides: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by

against him under section 271 was an abuse of the court's discretion, because Father's conduct did not warrant sanctions and the amount awarded creates an unreasonable financial burden. We conclude the record on appeal is inadequate to allow review of the court's exercise of its discretion.

A. Standard of Review

The trial court's determination of a needs-based fee award under section 2030 will not be disturbed on appeal in the absence of a clear showing of abuse of discretion. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 769.) We review an award of sanctions under section 271 for an abuse of discretion as well. (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1478.) """"[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order.""" [Citation.] 'In reviewing such an award, we must indulge all reasonable inferences to uphold the court's order.' [Citation.]" (*Ibid*.)

B. Deficiencies of the Record

A fundamental rule of appellate review is that "[a] judgment or order of a lower court is presumed to be correct on appeal." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . .' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The burden is on

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encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

the appellant to overcome the presumption of correctness and it is appellant's burden to provide an adequate appellate record to demonstrate error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Failure to furnish an adequate record will result in affirmance of the order appealed from. (*Id.* at pp. 1295-1296.)

The record on appeal in this case does not contain Mother's application for a move-away order, nor does it contain a reporter's transcript or suitable substitute for the April 18, 2007 hearing at which Father agreed to a move-away order. The record also does not contain a reporter's transcript or suitable substitute for a hearing held on December 17, 2007, at which Mells objected to the parties' custody stipulation. No minute orders have been provided for either date. In addition, the record does not contain Mother's income and expense declaration.

On this record, we are unable to review the factors relevant to a determination of a needs-based award under section 2030. We also cannot review conduct which may have also formed the basis for sanctions under section 271. We must indulge all inferences to support the order as to which the record is silent and presume the trial court properly determined the fee awards based on the parties' respective circumstances or conduct by Father that prolonged the litigation rather than encouraging cooperation amongst the parties.

Request for Sanctions

On appeal, Father asks this court to award sanctions against Mother, Mother's counsel, and Mells under Code of Civil Procedure section 128.5, based on bad faith actions or tactics during the litigation. Father's request for sanctions is baseless. Code of Civil Procedure section 128.5 authorizes trial courts to impose sanctions for bad-faith actions or tactics arising from proceedings initiated on or before December 31, 1994. Code of Civil Procedure 128.5 has no application on appeal in this case. (See *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal. 4th 804, 815.)

DISPOSITION

The February 1, 2008 order awarding attorney fees to Alexandra Mells and Maria Maldonado is affirmed. Alexandra Mells is awarded her costs on appeal from appellant Mario Maldonado.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.